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Air Liquide Malaysia Sdn Bhd v Lembaga Pembangunan Industri Pembinaan Malaysia

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R2(R1)–25–222 OF 2009
ROHANA YUSUF J
27 APRIL 2011

Administrative Law — Judicial review — Application for — Review of decision of respondent to impose levy on construction costs — Whether there was jurisdictional error in decision of respondent — Whether there was error in categorising applicant as contractor — Whether reliance on fact that applicant was registered with respondent misplaced — Whether decision to impose levy flawed — Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994 ss 2 & 34

Air Liquide Malaysia Sdn Bhd ('the applicant') entered into an agreement to supply oxygen ('the agreement') to one Malaysian Refining Company Sdn Bhd ('MRC'). It was a term of the agreement that the applicant as the supplier would undertake to sell and deliver oxygen on a stable, secure, reliable and continuous basis by building a plant and storage facility close to MRC's refinery. The applicant decided to build an oxygen generation plant ('the plant') on a piece of land it owned that was situated adjacent to MRC's refinery so as to satisfy the term of the agreement. The applicant engaged five contractors, who were contractors registered with the Lembaga Pembangunan Industri Pembinaan Malaysia ('the respondent'), to construct the plant. The respondent issued a notice to the applicant to furnish information on the construction works that had been undertaken to construct the plant. After the applicant had satisfactorily replied to the query for information the respondent issued another notice, which was followed by a third notice requesting the applicant to register itself under the Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994 ('the Act'), failing which the construction works must stop. Faced with the probability of a stop work order, the applicant registered itself under the Act. Thereafter the respondent imposed a levy in the sum of RM127,904.35 on the applicant. This was the applicant's application for a judicial review of the respondent's decision to impose a levy under s 34 on the applicant. By way of this application the applicant was essentially seeking a declaration that the notice imposing a levy on the applicant was ultra vires, null and void. The applicant contended that it was not a contractor and that the agreement it had entered into with MRC was not a construction contract but a contract for the supply of oxygen at a consideration. The applicant also submitted that the five contractors to whom it awarded the responsibility of constructing the plant were in fact the contractors who had undertaken the construction works. In response the respondent submitted that it had arrived at

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the conclusion that the applicant was a contractor after it had taken into account, inter alia, the information furnished by the applicant, the discussions between the applicant and respondent and visits to the construction site. The respondent also relied on the fact that the applicant had registered with the respondent. However, the applicant submitted that such reliance was misplaced, in that, the applicant had registered under protest following a wrongly issued notice threatening a stop work order if the applicant failed to comply with the notice.

Held, allowing the application with costs:

(1) The agreement between the applicant and MRC was a mere supply contract for oxygen. This supply contract could not be construed as a construction agreement merely because it contained a term that required the applicant as supplier to build a plant and storage facility. In fact the applicant had appointed five contractors to carry out various construction works of the plant as evidenced by the agreements between the applicant and these five contractors. From a careful perusal of all these agreements it was plain and clear that the applicant was an owner of the plant and could not be said to be a contractor and that the five contractors engaged by the applicant would be rightfully defined as contractors as envisaged by s 2 of the Act. As such the notice served by the respondent on the applicant requiring it to register under this Act was based on erroneous facts and law and by merely registering itself the applicant was not liable for any levy imposed under the Act (see paras 24–27).

(2) The decision of the respondent to impose a levy on the applicant would lead to an absurdity, in that it would cause a levy to be imposed on both the applicant as well as the five contractors who undertook the construction works in relation to the same plant. This could not be the intention of the Act (see paras 28–29).

(3) Under s 34(2) of the Act, the levy should be imposed on 'construction works' having a contract sum of RM500,000 and s 2 provides a definition of the kind of work that could be classified as 'construction works'. However, the respondent had based the levy on total 'project costs', which included the cost of land, and thus exceeded the authority given to it under the statute. This was another reason why the imposition of the levy was flawed (see para 30).

[Bahasa Malaysia summary

Air Liquide Malaysia Sdn Bhd ('pemohon') telah memasuki perjanjian untuk membekal oksigen ('perjanjian') kepada Malaysian Refining Company Sdn Bhd ('MRC'). Adalah terma perjanjian bahawa perayu sebagai pembekal akan berjanji menjual dan menghantar oksigen atas dasar yang stabil, selamat, boleh dipercayai dan berterusan dengan membina loji dan kemudahan penyimpanan

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yang berhampiran dengan kilang penapisan MRC. Perayu telah memutuskan untuk membina loji penjanaan oksigen ('loji') atas sebidang tanah yang dimilikinya terletak bersebelahan dengan loji penapisan MRC untuk memenuhi terma perjanjian. Perayu telah melantik lima kontraktor, yang merupakan kontraktor berdaftar dengan Lembaga Pembangunan Industri Pembinaan Malaysia ('responden'), untuk membina loji itu. Responden telah mengeluarkan notis kepada perayu untuk mengemukakan maklumat tentang kerja-kerja pembinaan yang telah dilaksanakan untuk membina loji tersebut. Selepas perayu dengan memuaskan telah menjawab pertanyaan untuk maklumat responden mengeluarkan notis lain, yang mana diikuti dengan notis ketiga meminta pemohon untuk mendaftarkan diri di bawah Akta Lembaga Pembangunan Industri Pembinaan Malaysia 1994 ('Akta'), dan jika gagal maka kerja-kerja pembinaan hendaklah diberhentikan. Berhadapan dengan kebarangkalian mendapat perintah berhenti kerja, perayu telah mendaftar di bawah Akta ini. Berikutan itu responden telah mengenakan levi berjumlah RM127,904.35 ke atas perayu. Ini adalah permohonan perayu untuk semakan kehakiman berhubung keputusan responden mengenakan levi di bawah s 34 Akta ke atas perayu. Melalui permohonan ini pemohon meminta deklarasi agar notis yang mengenakan levi ke atas perayu adalah ultra vires, terbatal dan tidak sah. Perayu berhujah bahawa ia bukan kontraktor dan bahawa perjanjian yang dimasukinya dengan MRC bukan kontrak pembinaan tetapi kontrak untuk membekalkan oksigen dengan balasan. Perayu juga berhujah bahawa lima kontraktor yang mana ia telah mengawardkan tanggungjawab membina loji itu sebenarnya kontraktor yang telah berjanji untuk melaksanakan kerja-kerja pembinaan. Sebagai menjawab responden berhujah bahawa ia telah membuat kesimpulan bahawa perayu adalah kontraktor setelah mengambilkira, antara lain, maklumat yang dikemukakan oleh perayu, perbincangan antara perayu dan responden dan lawatan ke kawasan pembinaan. Responden juga bergantung kepada fakta bahawa perayu telah berdaftar dengan responden. Walau bagaimanapun, perayu berhujah bahawa kebergantungan sedemikian tidak wajar, yang mana, perayu telah berdaftar dengan protes berikutan notis yang salah dikeluarkan yang mengugut perintah berhenti kerja jika perayu gagal mematuhi notis tersebut.

Diputuskan, membenarkan permohonan dengan kos:

(1) Perjanjian antara pemohon dengan MRC adalah hanya kontrak bekalan oksigen. Kontrak bekalan ini tidak boleh ditafsirkan sebagai perjanjian pembinaan hanya kerana ia mengandungi terma yang menghendaki perayu sebagai pembekal untuk membina loji dan kemudahan penyimpanan. Bahkan pemohon telah melantik lima kontraktor untuk menjalankan pelbagai kerja pembinaan atas loji itu sebagaimana yang telah dibuktikan dengan perjanjian-perjanjian antara perayu dan kelima-lima kontraktor tersebut. Berdasarkan semakan teliti kesemua perjanjian tersebut ia jelas dan nyata bahawa perayu adalah pemilik loji

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tersebut dan tidak boleh dikatakan sebagai kontraktor dan bahawa kelima-lima kontraktor yang dilantik oleh perayu layak ditafsirkan sebagai kontraktor sebagimana dinyatakan oleh s 2 Akta. Oleh itu notis yang diserahkan oleh responden ke atas perayu yang menghendakinya untuk berdaftar di bawah Akta ini adalah berdasarkan fakta dan undang-undang yang salah dan dengan hanya mendaftarkan dirinya perayu tidak bertanggungjawab ke atas apa-apa levi yang dikenakan di bawah Akta (lihat perenggan 24–27).

(2) Keputusan responden untuk mengenakan levi ke atas perayu akan membawa kepada suatu yang tidak masuk akal, yang mana ia akan menyebabkan levi dikenakan ke atas pemohon dan juga kelima-lima kontraktor yang menjalankan kerja-kerja pembinaan berkaitan loji yang sama. Ini bukan niat Akta (lihat perenggan 28–29).

(3) Di bawah s 34(2) Akta, levi patut dikenakan ke atas 'construction works' yang mempunyai jumlah kontrak sebanyak RM500,000 dan s 2 memperuntukkan definisi berhubung jenis kerja yang boleh diklasifikasikan sebagai 'construction works'. Walau bagaimanapun, responden telah berasaskan levi itu atas jumlah 'project costs', yang termasuklah kos tanah, dan oleh itu melebihi kuasa yang diberikan kepadanya di bawah statut. Ini adalah sebab lain kenapa pengenaan levi adalah cacat (lihat perenggan 30).]

Notes

For cases on application for judicial review, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 254–279.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab- Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417, SC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317, CA (refd)

Legislation referred to

Courts of Judicature Act 1964

Federal Consitution Part II

Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994. ss 2, 25, 29, 34, 34(2), (8)

SM Chan (Tan Chuan Yong & SM Chan) for the applicant.
Imran Ismail (Zul Rafique & Partners) for the respondent.

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Rohana Yusuf J:

[1] This was an application for a judicial review by the applicant against the decision of the respondent imposing payment of levy on the applicant under s 34 of the Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994 ('the Act').

BRIEF FACTS

[2] The applicant is a Malaysian company in the business of manufacturing and selling industrial, medical and electronic gases, medical and safety equipment and accessories, project engineering, installations and total gas management and related services. The applicant is granted manufacturing licence by the Ministry of International Trade and Industry to produce oxygen, nitrogen and argon (see exh STH2).

[3] The applicant contracted to supply oxygen to its customer by the name of Malaysian Refining Company Sdn Bhd ('MRC') for MRC's refinery at Sungai Udang, Melaka vide the agreement in exh STH3.

[4] The recital to this the oxygen supply agreement provides that 'The Parties desire to enter into this Contract for sale and purchase of the said Oxygen upon the terms and conditions hereinafter appearing'. Article 3 of the agreement deals with the scope of the said agreement where the supplier (the applicant) undertakes to sell and deliver oxygen on a stable, secure, reliable and continuous supply. For this purpose the applicant agreed to build an oxygen production plant and storage facility adjacent to MRC's refinery. The construction of the plant would satisfy that requirement, for a stable and reliable supply and it also forms a term of the agreement.

[5] Prior to that, the applicant acquired a piece of land in Mukim Sungai Udang, Daerah Melaka Tengah, 76400 Melaka situated adjacent to MRC's refinery on which the applicant intended to build an oxygen generation plant (the plant) at RM6,448,350. The plant was intended to produce nitrogen and argon for the local market. The building of the plant would satisfy the term of agreement between the applicant and MRC.

[6] The total projected or budgeted costs to build the equipment and to complete the plant including land costs was approximately RM102,323,481. The breakdowns are as follows:

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Particulars		Amount
(a) Land and Equipment Costs	...	RM 58,423,239.00
(b) Construction Costs	...	RM 33,685,000.00
(c) Material Hardware Costs	...	RM 1,289,864.00
(d) Project Management	...	RM 8,171,509.00
(e) Pre-Operating Expenses	...	RM 753,869.00

The breakdowns of the total projected or budgeted costs amounting to RM102,323,481 was certified by the consultant engineer Zaidun-Leeng Sdn Bhd, in exh STH14.

[7] The construction costs in item (b) above was for RM33,685,000. The applicant awarded the construction works to five following contractors (shown in exh STH6). They are as follows:

Particulars of contractor and contract work		Contract sum
i. Steamline (Malaysia) Sdn Bhd Package 1 – Construction & Completion Of 33 KV Substation Building & Plinths Back-Up System	...	RM 5,230,000.00
ii. Kirara Kenali Sdn Bhd Package 2 – Construction & Completion Of Plinths At Plant Area; 2 Storey Control Room; 1 Storey Office Building; 1 Storey Guard House; Motorcycles Syed and Ancillary Works.	...	RM 5,800,000.00
iii. ZhuHai Gong Tong Mechanical Equipmnt Wu – Jiang Supply, installation and commissioning Of Cryogenic liquid tanks	...	USD1,050,000.00
iv. MIE Industrial Sdn Bhd	...	
(a) Supply, Installation, Testing & Commissioning of 33/11 KV Transformer C/W HT Switchgears & Cabling Works	...	RM 6,000,000.00
(b) Supply, Installation, Testing & Commissioning of Electrical & Telephone Works	...	RM 5,200,000.00
(c) Instrumentation Works For Air Separation Unit	...	RM 2,600,000.00
v. Kelington Technologies Sdn Bhd Mechanical Construction Services For the Installation of Air Separation Plant	...	RM 5,180,000.00

[8] All these five contractors are registered with the respondent under the Act. Exhibit STH9 shows the certificates of registration of these contractors issued by the respondent.

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[9] The respondent gave notice to the applicant in Form CIDB N1/97 notifying the applicant to submit information on the construction works. After explanation been made by the applicant of the nature of its business and the fact that the applicant is the owner and not the contractor of the plant the respondent accepted the explanation.

[10] However, on 14 May 2009, the respondent again issued notice to the applicant to furnish information on construction works. This was followed by a notice requesting the applicant to register itself under the Act failing which, the construction works must stop. Facing with a probability of stop work order, the applicant provided the particulars as in exh STH14 and in protest registered itself under the Act.

[11] Thereafter, the applicant received notice imposing the levy to be paid in the sum of RM127,904.35 within stipulated time otherwise a fine of RM50,000 would be imposed. The levy was computed based on the 0.25% of the total project costs purportedly made under s 34(2) of the Act.

[12] The applicant is challenging this decision seeking for various declarations. Essentially the applicant is seeking for a declaration that the notice imposing levy on the applicant is ultra vires, null and void. The applicant contended that the imposition of levy is an abuse of power and based on malafide because it is based on erroneous facts and law.

APPLICABLE ADMINISTRATIVE LAW

[13] A judicial review jurisdiction has been extended beyond an inherent common law power, to one that is grounded on Part II of the Constitution and para I of the Schedule to the Courts of Judicature Act 1964 read in conjunction with s 25. These constitutional and statutory basis however do not, and indeed cannot curtail the scope of powers conferred upon our courts in judicial review proceedings. Even so the courts should not reverse a decision unless there is proven a clear jurisdictional error (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145).

[14] A jurisdictional error can arise when a tribunal of limited jurisdiction does not act within the proper scope of its statutory function and reference. Related to this is the question of whether it has acted without sufficient evidence, or on no evidence, or has misconstrued the law on an issue on which its decision is founded.

[15] Premised on the basis that review jurisdiction is not appeal, it would be wrong for this court 'to hear the dispute de novo and decided it on its merits' as

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stated by Jemuri Serjan SCJ in *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417 at p 419. Thus it would be necessary to consider whether in this particular situation the respondent has so erroneously construed the evidence and the applicable legal provisions such that an error of law requiring correction results, or whether it has reached a decision without evidential support, or whether its decision is unreasonable and irrational.

[16] As for error of law, in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317, for example, the applicable principles are analysed comprehensively, with the Court of Appeal stating that 'it is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such error are not closed' (per Gopal Sri Ram JCA (as he then was) at p 342). Nevertheless the categories include where the decision maker 'misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law', with the 'true principle' stated as:

> An inferior tribunal or other decision-making authority, whether exercising a quasi judicial function or purely an administrative function, has no jurisdiction to commit an error of law.

[17] As for the no evidence rule, '[a] tribunal which has made a finding of primary fact wholly unsupported by evidence, or which has drawn an inference wholly unsupported by any of the primary facts found by it, will be held to have erred in point of law': *De Smith, Woolf & Jowell, Judicial Review of Administrative Action*, (3rd Ed), 1995 at pp 282–283. This rule has been neatly summarised in MP Jain, *Administrative Law of Malaysia and Singapore*, (3rd Ed), 1997 as follows:

> If there is some evidence to support a finding of fact, it is not then for the Courts to go into the sufficiency or adequacy of the evidence. It is not the Court's function to review, reassess, depreciate, reappraise evidence, or draw its own inferences as to facts from the evidence. The court will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence (at p 715).

On the special facts of this application, it is therefore necessary for this court to scrutinise the respondent's decision in the light of the above established principles.

ERROR IN DEFINING APPLICANT AS CONTRACTOR

[18] Based on the applicable administrative law above the first question to be asked is whether there is jurisdictional error in the decision of the respondent herein. The applicant contended that there was an error in categorising the

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applicant as a contractor under the Act. To determine this issue, I will now proceed to analyse whether this Act applies to the applicant in this instance.

[19] Section 2 of the Act defines 'contractor' to mean a person who undertakes to carry out and complete 'construction works'. Further to that, s 2 also defines 'construction works' as follows:

> 'Construction works' means the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of —
>
> (a) any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;
>
> (b) any road, harbour works, railway, cableway, canal or aerodrome;
>
> (c) any drainage, irrigation or river control works;
>
> (d) any electrical, mechanical, water, gas, petrochemical or telecommunication works; or
>
> (e) any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation works,
>
> and includes any works which form an integral part of, or are preparatory to or temporary for the works described in paragraphs (a) to (e), including site moving, excavation, laying of foundation, site restoration and landscaping;

[20] In arriving at a conclusion that the applicant is 'a contractor undertaking construction works' the respondent had taken into account the following:

(a) the information furnished by the applicant to the respondent vide notice dated 2 February 2009 (notice CIBD N1/97) (exh HO2);

(b) the letter by the applicant informing that the applicant 'dalam proses membina logi oksigen di Melaka' (exh HO3);

(c) discussions and meetings between the applicant and respondent's representative;

(d) visits to the construction site; and

(e) the respondent's investigation that lead to the applicant's registration under the Act.

[21] The applicant contended that the decision of the respondent in its findings that the applicant is a 'contract or undertaking construction works' is unreasonable in view of the following contract documents. First, the agreement for the oxygen supply between the applicant and MRC is not a construction contract, but it is a contract for the supply of oxygen at a consideration agreed

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based on the price of oxygen. The five agreements in exh STH6 made between the applicant and the contractors show that these five contractors are in fact contractors undertaking the 'construction works'.

[22] The applicant contended the letter that states 'Kami dalam proses membina Logi Oksigen di Melaka' by the applicant was taken out of context by the respondent. It was explained in the affidavit in encl 8 that the letter was written by its safety and health officer for the welfare and safety of the applicant's worksite. The investigation at site which according to the respondent revealed that the applicant was indeed the main contractor was in fact conducted with no notice been given to the applicant and there is thereby a breach of the rule of natural justice.

[23] The reliance on the fact that the applicant has registered with the respondent according to the applicant was wrongly made because the applicant in fact did so under protest, following a wrongly issued notice by the respondent. The notice threatened a stop work order should the applicant failed to comply.

FINDINGS

[24] I have perused through the oxygen supply agreement in exh STH3. It is clear that upon a perusal of this document it shows that it is a mere supply contract for oxygen. One of the terms agreed by the applicant as a supplier is to build a plant and storage facility for this purpose. This supply contract cannot be construed as a construction agreement. In fact the construction of the plant under this agreement has been awarded to five contractors as evidenced in exh STH6. These agreements are made between the applicant with Steamline (Malaysia) Sdn Bhd, Kiara Kenali Sdn Bhd, Zhu Hai Tang Mechanical, MIE Industrial Sdn Bhd and Kelington Technologies to carry out the various construction works of the plant. These five contractors are also contractors registered with the respondent (as shown as in exh STH9). One of the five contractors MIE Industrial Sdn Bhd who had conducted the construction works in relation to the plant had been imposed with levy under s 34 of the Act as seen in STH10. Payment of the levy was also made by MIE Industrial Sdn Bhd.

[25] From all these documents it is plain and clear that the applicant here is an owner of the plant and cannot be said to be 'a contractor who undertakes construction works'. In fact the five contractors engaged by the applicant would rightfully be defined as 'contractors who undertakes construction works' as envisaged by s 2 of the Act.

[26] The decision made by the respondent that the applicant is a contractor

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who undertakes and carries out the construction works defies all the evidence shown in the contract documents. All these contract documents on the whole is pointing to one conclusion, that the applicant is the owner of the plant and not a contractor undertaking the construction works as envisaged by s 2 of the Act. The applicant here is not undertaking any construction works. On this basis the requirement made by the respondent in serving notice to the applicant register under this Act was done based on erroneous facts and law.

[27] The respondent contended that the information that was based in its decision was the information given by the applicant in exhs HO2 and HO3. HO2 is a notice by the respondent to the applicant and HO3 is a letter by the applicant's representative to request to expedite registration with the respondent. The respondent is invocation of the doctrine of estoppel relying on the Court of Appeal decision in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, in my view has no application here. For one thing, when we are dealing with statutory provisions or statutory powers I do not see how this doctrine can apply. This is not a case where the two parties are in transaction as stated in *Boustead*. Furthermore the requirement for registration was made on erroneous application of the law to the facts. The applicant had in fact registered itself under protest. By merely registering itself, it cannot ipso facto make the applicant liable to be levied under the Act.

DOUBLE LEVY

[28] It must also be pointed out that in the circumstances of the present case, the decision of the respondent to impose levy on the applicant will lead to an absurdity. The effect of such decision would caused imposition levy of on both the applicant as well as the five contractors who undertake the construction works in relation to the same plant. This cannot be the intention of the Act.

[29] The requirement of registration of contractor under Part VI of the Act requires only of 'person who undertakes to carry out or carries out and completes construction works'. Then it follows that under s 29 the respondent can act against contractor who carries out construction works but did not register itself. It is plain and clear that the requirement to register is imposed on a contractor who undertakes and carries out construction works. All the construction works of this plant is to be carried out by the five contractors engaged by the applicant under the respective agreement in STH6, and not the applicant.

QUANTUM OF LEVY

[30] The imposition of the levy is also flawed for another reason. Under s

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34(2) levy should be imposed on 'construction costs'. Section 34(2) provides that the respondent can impose on registered contractor for construction works having a contract sum of above RM500,000. Under s 34(8), 'contract sum' is defined as consideration for a contract in respect of construction works. What is 'construction works' has to be fallen back on the definition in s 2. It outlines in items (a)–(e) what the construction works are, which includes any work that form an integral part of all those described in (a)–(e). Such works include site clearance, soil investigation and improvement, earth moving, excavation, laying of federation, site restoration and landscaping. By basing the levy on total 'project costs' the respondent had not observed this provision as the applicant's 'project costs' includes cost of land. The respondent had exceeded the authority given under the statute in using 'project costs' when the law allows imposition on merely the contract sum of the construction costs. It must again be emphasised that, 'contract sum' in s 34(8) refers to only construction works, and the word 'works' is equally emphasised in the definition of 'construction works'.

[31] For all the above reasons the respondent had in my view committed jurisdictional error in relying upon erroneous facts and legal provisions in arriving at its decision. I hereby allow the application of the applicant in encl 1 in prayers C(1) and C(6) with costs of RM10,000.

Application allowed with costs.

Reported by Kohila Nesan